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No. 80-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARL JAY YOW, *Petitioner,*

v.

AMERICAN HOME ASSURANCE COMPANY,
a New York Corporation, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151
(703) 483-5149

Counsel of Record

Of Counsel:

WILLIAM N. ALEXANDER, II
GREER & ALEXANDER

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REASONS FOR GRANTING THE WRIT

The surprising claim is made in the brief opposing certiorari that the decision of the District Court

"was a grant of summary judgment."[1]

This is quite wrong. The case was submitted to the District Court for decision on eleven depositions and

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[1] Brief of respondent, p. 3.

over a hundred exibits. The very order submitting the case stated that the parties had agreed

> ". . .to submit all questions of law *and fact* to the Court on the record presently before the Court.. . ."[2]

The opinion of the District Court is to the same effect:

> ". . .[T]hey submitted all questions of law *and fact* to the Court on the record."[3]

The District Court continued:

> "Since the Court is both trier of law *and fact*, further offers at settlement, if any, have not been communicated to the Court."[4]

A District Court granting summary judgment decides no factual issues. Nothing is more certain than

> ". . .[T]he court cannot try issues of fact on a Rule 56 motion.. . ."[5]

The District Court did not treat the judgment for defendant as a summary judgment:

> "The Court must conclude, then, that even if Virginia recognizes the tort pressed by plaintiff, plaintiff has not *proved* that defendant's refusal to pay was grounded upon malice, wantonness, or oppressive conduct. It follows that no tort nor punitive damages are recoverable in this case. Judgment must enter for defendant on counts one, two, three, and four of the complaint. Judgment shall enter for plaintiff on count five insofar as count

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[2] Appendix below, p. 26

[3] Appendix to petition for certiorari, p. 1a; emphasis added.

[4] Appendix to petition for certiorari, p. 5a; emphasis added.

[5] 10 Wright and Miller, *Federal Practice and Procedure*, at p. 379.

five seeks damages under the contract. Plaintiff shall recover his costs. An appropriate order shall issue."[6]

The Fourth Circuit did not consider that the District Court's decision had been a summary judgment. The full opinion was as follows:

> "This diversity action is based upon an insurance company's failure to settle a claim with its insured. With respect to liability, the parties waived jury trial. The district court held that the insurance company was liable for the full amount of the contract, but that the facts did not warrant a finding of liability under plaintiff's various tort claims. *The district court's factual findings were not clearly erroneous* and we can find no error in the application of Virginia law to those facts. The facts found by the district court simply do not warrant an award of exemplary or punitive damages."[7]

We are cited by the respondent to *Jones* v. *New York Central Railroad Company*, 182 F.2d 326 (6th Cir. 1950), and told that it is authority for not requiring findings of fact in the case at bar. But as the court stated in *Jones*,

> "The case was tried to the Court without the intervention of a jury *and upon a stipulation of facts.*"[8]

There was no stipulation of facts in the case at bar. There was a record consisting of eleven depositions and over a hundred exhibits. From those materials the District Court found the facts.

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[6] Appendix to petition for certiorari, p. 8a; emphasis added. The District Court had earlier indicated that partial summary judgment would be given plaintiff on the contract. Appendix below, p. 27.

[7] Appendix to petition for certiorari, p. 10a; emphasis added.

[8] 182 F.2d at 327; emphasis added.

The circumstance that a case is submitted on depositions and exhibits does not obviate the requirement of findings. See *Epperson* v. *Connecticut Fire Insurance Co.*, 314 F.2d 486 (10th Cir. 1963), where the case "was tried on depositions only. . . ."[9]; and *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967), where "the only testimony was before the Court by deposition. . . ."[10] In each case the requirement that the District Court make findings of fact was recognized. No authority can be cited for the proposition that findings are not required when a District Court decides a case upon depositions.

The respondent also tells us that the failure to make findings on the fraud claim was not called to the attention of the Fourth Circuit, and that the point is made for the first time to this Court. This is also quite wrong. Petitioner called attention to the District Court's failure to make findings on the fraud count and asked the Fourth Circuit to notice the fraud on the face of the documentary record.

The respondent has quoted from petitioner's reply brief in the Fourth Circuit, as follows:

> "The District Court made no findings as to fraud. No remand for such findings is necessary. The evidence with respect thereto is largely documentary, in the record, and undisputed."

From this we are told that petitioner "thus ratified the District Court's treatment of findings of fact. . . ."[11] This assertion, to put the matter as charitably as possible, is without merit. The full quota-

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[9] 314 F.2d at 491.

[10] 385 F.2d at 386.

[11] Respondent's brief, p. 6.

tion from petitioner's reply brief before the Fourth Circuit was as follows:

> "Reverend Yow's first cause of action in his complaint filed in the District Court was for fraud. The District Court made no findings as to fraud. No remand for such findings is necessary. The evidence with respect thereto is largely documentary, in the record, and undisputed. *McComb* v. *Utica Knitting Co.*, 164 F.2d 670 (2nd Cir. 1947); *King* v. *Comm'n*, 458 F.2d 245 (6th Cir. 1972).

The language from Judge Frank's opinion in *McComb* which petitioner had in mind was this:

* * *

"As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him."[12]

The pertinent language from *King* was this:

> "[T]he Commissioner's brief suggests that in the event of a reversal the case should be remanded to the Tax Court for further findings on these issues. However, a remand is unnecessary if all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed. . . ."[13]

A case of similar texture is *Sbicca-Del Mac* v. *Milius Shoe Co.*, 145 F.2d 389 (8th Cir. 1944), where this was said:

> "The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the

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[12] 164 F.2d at 674.

[13] 458 F.2d at 249.

> Rules of Civil Procedure, upon the defenses of ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them."[14]

Petitioner did not wish his case to be delayed by remand; the variance between brochure and policy was matter of record.

CONCLUSION

The District Court rendered judgment on the first count of petitioner's case without making the findings of fact required by Rule 52.[15] The Fourth Circuit affirmed. The fraud count was separately stated and involved different facts from the other counts. The circumstances of an adjudication of a cause of action without making the findings of fact required by Rule 52 are sufficiently extraordinary that this Court should exercise its power of supervision.

Respectfully submitted,

T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia 24151

Counsel of Record

Of Counsel:

WILLIAM N. ALEXANDER, II
Greer & Alexander

October, 1980

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[14] 145 F.2d at 400.

[15] The omission was deliberate. See appendix to the petition for certiorari, p. 7a.